RECORD AND BRIEF

Supreme Court, U.S.
FILED
AUG 16 2017
OFFICE OF THE CLERK

Nos. 16-285, 16-300, and 16-307

In The
Supreme Court of the United States

EPIC SYSTEMS CORPORATION, *Petitioner,*

v.

JACOB LEWIS, *Respondent.*

ERNST & YOUNG, LLP, et al., *Petitioners,*

v.

STEPHEN MORRIS, et al., *Respondents.*

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

MURPHY OIL USA, INC., et al., *Respondents.*

On Writs Of Certiorari To The United States Courts Of Appeals For The Fifth, Seventh, And Ninth Circuits

BRIEF OF *AMICI CURIAE* MARYLAND, CALIFORNIA, CONNECTICUT, DELAWARE, ILLINOIS, IOWA, MASSACHUSETTS, MINNESOTA, NEW YORK, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA, WASHINGTON, AND THE DISTRICT OF COLUMBIA SUPPORTING RESPONDENTS IN NOS. 16-285 AND 16-300 AND PETITIONER IN NO. 16-307

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QUESTION PRESENTED

Did the Seventh and Ninth Circuits correctly conclude that the Federal Arbitration Act does not require enforcement of arbitration agreement terms that are illegal under the National Labor Relations Act and unenforceable under the Norris-LaGuardia Act?

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NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962) 13

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Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) 3, 15

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OTHER AUTHORITIES

75 Cong. Rec. 4504 (1932) 8, 11

Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 Berkeley J. Emp. & Lab. L. 71 (2014) 26

Annette Bernhardt & Siobhan Mcgrath, *Trends in Wage and Hour Enforcement by the U.S. Department of Labor 1975-2004*, Brennan Center for Justice (Sept. 1, 2005) 31

Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* 2 (2009) 24

Brady Meixell & Ross Eisenbrey, *An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year*, Economic Policy Institute (Sept. 11, 2014) 24

Catherine L. Fisk, *Collective Actions and Joinder of Parties in Arbitration: Implications of* D.R. Horton *and* Concepcion, 35 Berkeley J. Emp. & Lab. L. 175 (2014) 19, 20

Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. Pa. L. Rev. 457 (1992) 25, 26, 27

Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N. Carolina L. Rev. ___ (forthcoming 2018) 26

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Daniel Jacoby, *Laboring for Freedom: A New Look at the History of Labor in America* 62 (1998) 9

David Horton & Andrea Cann Chandrasekher, *Employment Arbitration After the Revolution*, 65 DePaul L. Rev. 457 (2016) 28

David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 Comp. Lab. L. & Policy J. 59 (2005) 25

Department of Labor, Wage and Hour Division Data Tables 30

Eileen Silverstein, *Collective Action, Property Rights and Law Reform: The Story of the Labor Injunction*, 11 Hofstra Lab. L.J. 97 (1993) 11

Felix Frankfurter & Nathan Greene, *Legislation Affecting Labor Injunctions*, 38 Yale L.J. 879 (1929) 9

H.R. Rep. No. 96, 68th Cong., 1st Sess. (1924) 16

Iliza Bershad, Note, *Employing Arbitration: FLSA Collective Actions Post-*Concepcion, 34 Cardozo L. Rev. 359 (2012) 20

Irene Lurie, *Enforcement of State Minimum and Overtime Laws: Resources, Procedures, and Outcomes*, 15 Employee Rts. & Emp. Pol'y J. 411 (2011) 32

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J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 Wm. & Mary L. Rev. 1137 (2012) 29

Jacob S. Meyer & Robert Greenleaf, *Enforcement of State Wage and Hour Laws: A Survey of State Regulators* 98-106 (April 2011) 31, 32

Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 Brook. L. Rev. 1309 (2015) ... 25, 26, 28, 34

Joel I. Seidman, *The Yellow Dog Contract* (1932) 8

Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 Yale L.J. 2804 (2015) 27, 29

Katherine Tonnas, *The Louisiana Commission on Human Rights: Committed to Protecting Citizens from Discriminatory Practices*, 51 La. B.J. 266 (2003) 33

Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, Economic Policy Institute (Dec. 2015) 26

Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 Vand. L. Rev. 363 (2010) 30

Matthew W. Finkin, *The Meaning and Contemporary Vitality of the Norris-LaGuardia Act*, 93 Neb. L. Rev. 6 (2014) 8, 9, 11

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Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 Akron L. Rev. 813 (2004) 30

Mike Nowatzki, *Spike in Complaints Leads to Investigation Backlog at N.D. Labor Department*, Bismark Tribune (Oct. 23, 2015) 32

Myron Levin, *Fear Stifles Wage Abuse Complaints*, Tucson Sentinel (May 19, 2014) 25

Nantiya Ruan, *What's Left to Remedy Wage Theft? How Arbitration Mandates That Bar Class Actions Impact Low-Wage Workers*, 2012 Mich. St. L. Rev. 1103 (2012) 7, 24, 26, 27, 34

National Ass'n of State Budget Officers, *Summary: Spring 2017 Fiscal Survey of States*, 1 (June 15, 2017) 31

Pauline T. Kim, *Addressing Systemic Discrimination: Public Enforcement and the Role of the EEOC*, 95 B.U. L. Rev. 1133 (2015) 33

Ryan Maness, *Thirty-One States Face Revenue Shortfalls for the 2017 Fiscal Year*, MultiState Insider (Jan. 3, 2017) 31

Spencer Woodman, *The Wage Theft Epidemic*, In These Times (Feb. 20, 2013) 32, 33

The 2015 Carlton Fields Jorden Burt Class Action Survey: *Best Practices in Reducing Cost and Managing Risk in Class Action Litigation* 28

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Theodore Eisenberg, et al., *Arbitration's Summer Soldiers*, 41 U. Mich. J. L. Reform 871 (2008) 28

Timothy A. Galáz, *Bargaining for the Next Gay Player: How Can Jason Collins Help to Develop the National Basketball Association into a More Inclusive Workplace?*, 21 Jeffrey S. Moorad Sports L.J. 461 (2014) 33

U.S. Government Accountability Office, GAO-02-835, *Collective Bargaining Rights: Information on the Number of Workers With and Without Bargaining Rights* (Sept. 2002) 14

U.S. Government Accountability Office, GAO-09-458T, *Wage and Hour Division's Complaint Intake and Investigate Processes Leave Low Wage Workers Vulnerable to Wage Theft* (Mar. 25, 2009) 30

W. Lyle Stamps, *Getting Title VII Back on Track: Leaving* Allison *Behind for the* Robinson *Line*, 17 BYU J. Pub. L. 411 (2003) 27

INTEREST OF *AMICI CURIAE*

The Amici States have three important interests in these consolidated cases. First, our residents have long held a "fundamental right" under the National Labor Relations Act ("NLRA") to engage "'in concerted activities'" for their "'mutual aid or protection.'" *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (quoting 29 U.S.C. § 157). Many of the Amici States have enshrined the same right in our own labor statutes and have enacted laws providing that our courts shall not enforce contracts requiring an individual employee to waive that right. *See infra* at 11-14. We have a responsibility to safeguard the rights provided by these statutes.

Second, the Amici States have a duty to protect our residents from violations of state and federal employment laws. Because we do not have the resources to enforce every violation of these laws, we rely on individual employees to help. In turn, these employees often depend on their ability to join together to assert their rights. Experience shows that without that ability to join together, many fewer employees will pursue claims, thus placing additional burdens on already over-burdened state regulators and leading to the under-enforcement of state and federal workplace protections.

Third, the Amici States have an interest in any case involving the interpretation of a statute, such as

the Federal Arbitration Act, that has been found to preempt state laws.

SUMMARY OF ARGUMENT

1. The states and the federal government have long recognized that employees need the right to join together in concerted activities and should not be forced to sign away that right just to earn a living. During the early years of the 20th Century, many employers included terms in their contracts that – like the arbitration agreements at issue here – required individual employees to waive the ability to join together as a condition of employment. In response to these "yellow dog" contracts, Congress and many states enacted legislation rendering unenforceable all contract terms that required individual employees to waive their ability to engage in concerted activities.

Congress and many states then went further, enacting the NLRA and analogous state laws to grant employees substantive "right[s]" to engage in "concerted activities" for their "mutual aid or protection," and to make it illegal for employers to interfere with those rights. Together, these statutes ensure that employees have true liberty of contract, may meaningfully assert their rights against their employers, and cannot be forced to waive their ability to join together as a condition of employment.

2. Any contract term that requires an individual employee to waive his right to engage in concerted

activities as a condition of employment is thus illegal under the NLRA and unenforceable under the Norris-LaGuardia Act. The Employers' interpretation of the Federal Arbitration Act ("Arbitration Act") would render these protections meaningless whenever an arbitration agreement is at issue. That is not what Congress intended. Congress intended the Arbitration Act to make "arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). By contrast, the Employers' interpretation would elevate arbitration agreements over every other type of contract.

Similarly, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), does not require that federal courts enforce concerted-action waivers that are illegal under the NLRA and unenforceable under the Norris-LaGuardia Act. Here, unlike in *Concepcion*, there is no evidence that a generally applicable rule invalidating otherwise illegal contract terms was intended to "disfavor[] arbitration," *id.* at 341; would have a "disproportionate impact" on arbitration agreements, *id.* at 342; or would "interfere[] with fundamental attributes of arbitration," *id.* at 344.

In particular, the rule applied here by the Seventh and Ninth Circuits does not conflict with arbitration's fundamental attributes, because those courts merely invalidated contract terms that require individual employees to waive *all* rights to *all* types of concerted legal claims. This Court has never suggested that arbitration's fundamental attributes prohibit every

kind of group claim in every kind of arbitration proceeding.

To the contrary, both the standard joinder of related claims and the collective action mechanism under the Fair Labor Standards Act are consistent with the fundamentals of arbitration. These types of joint proceedings are not as formal as the consumer class actions in *Concepcion*, do not require the same kind of procedural formality to protect absent members, and do not risk changing the stakes of arbitration by aggregating tens of thousands of claims.

Even if the Employers' interpretation of the Arbitration Act were correct, however, that statute would yield to the NLRA and Norris-LaGuardia Act. These two later-enacted labor statutes, not the Arbitration Act, govern whether employers may dictate the terms under which their employees can join together for "mutual aid or protection." After all, the NLRA and Norris-LaGuardia Act were designed to protect employees from being forced to sign away their ability to act collectively, a purpose that would be defeated if employers were allowed to dictate the terms under which their employees may act collectively.

3. Finally, a ruling in favor of the Employers would harm the states and lead to the systemic underenforcement of state and federal workplace protections, including wage-and-hour laws and anti-discrimination statutes.

If employees must bring all of their claims individually, most workers will not bring claims at all because

(a) workers often fear that filing claims individually, rather than collectively, will make them the target of reprisal by employers; (b) in the absence of a collective suit, workers may not even know that their rights have been violated; (c) an individual employee's claim is likely to be small, deterring him from filing a claim; and (d) employees often cannot prove pattern-and-practice claims without participation from their peers.

As a result, an individual employee's only real alternative to collective arbitration is not bilateral arbitration. It is no arbitration. Of course, many employers know that concerted-action waivers will decrease the number of claims against them and will insulate them from liability; that is often why their form contracts include these provisions.

This reduction in private enforcement will impose on state and federal regulators the need to fill the void. But state and federal employment laws were designed to be enforced primarily by employees, not by government agencies. We thus rely on the ability of individual employees to band together and enforce their workplace rights. Although state and federal regulators play an important role, they are already overburdened. State enforcement agencies also continue to struggle with chronic budget shortfalls, layoffs, and hiring freezes. These resource constraints mean that at any given time the states' enforcement efforts are, at best, merely scratching the surface of potential violations.

For these reasons, if this Court lends its imprimatur to the Employers' tactics, the result will be the systemic under-enforcement of state and federal law. That cannot be what Congress intended. Congress sought to encourage robust enforcement, not to encourage employers to foster creative pathways to evade compliance.

ARGUMENT

Imagine a single mother, laid off from work months ago, who has been unable to land a job and whose unemployment benefits are about to expire. A local employer offers her a job but asks that she sign a form contract. The contract not only requires arbitration of any disputes but also prohibits joint claims involving more than one employee. Similarly, imagine a worker employed for nearly thirty years with the same company and one year from eligibility to retire with a full pension. One day, his supervisor explains that he must sign an agreement waiving his ability to bring any collective claims, or be fired. *See, e.g.*, *Everglades College, Inc.*, 363 N.L.R.B. No. 73 (Dec. 23, 2015), petition for review pending No. 16-10341 (11th Cir.) (involving a plaintiff who was fired for refusing to sign a mandatory arbitration agreement that included a ban on concerted legal action).

These individuals, and many others like them, have no real choice but to sign these agreements. Perhaps in theory they could reject the contracts or try to

haggle over the terms, but someone in their shoes could not take that risk. Putting abstract theory aside, the "reality of the workplace is that workers have no meaningful opportunity to negotiate the terms of" these types of "take-it-or-leave-it arbitration . . . clauses." Nantiya Ruan, *What's Left to Remedy Wage Theft? How Arbitration Mandates That Bar Class Actions Impact Low-Wage Workers*, 2012 Mich. St. L. Rev. 1103, 1133 (2012).

Recognizing this reality, the Norris-LaGuardia Act, the NLRA, and many state analogues grant individual employees the right to join together in concerted activities and, just as importantly, protect these employees from being forced to sign away that right just to earn a living. *See* Part I, *infra*. The Federal Arbitration Act does not override those rights. *See* Part II, *infra*. If the law were otherwise, it would dramatically reduce the private enforcement of federal and state workplace protections. Because states do not have sufficient resources to make up for that reduction in private enforcement, that would lead to the systemic under-enforcement of these important workplace protections. *See* Part III, *infra*.

I. CONGRESS AND THE STATES HAVE LONG RECOGNIZED THAT INDIVIDUAL EMPLOYEES NEED A RIGHT TO ENGAGE IN "CONCERTED ACTIVITIES" TO ENJOY TRUE FREEDOM OF CONTRACT.

Both Congress and the states have long recognized that individual workers have a "fundamental right,"

Jones & Laughlin Steel Corp., 301 U.S. at 33, to engage in concerted activities for their mutual aid or protection. Initially, Congress and many states passed laws declaring unenforceable contracts that required individual employees to waive any ability to join together to improve their working conditions. Later, Congress and the states enacted the NLRA and state analogues to guarantee workers a substantive right to engage in concerted activities. Together, these statutes ensure that individual employees no longer have to "accept unconditionally the terms laid down by the employer," including terms that – like those in the arbitration clauses at issue here – require an employee to "singly present any grievance." 75 Cong. Rec. 4504 (1932) (remarks of Sen. Norris on the Norris-LaGuardia Act).

1. During the early 20th Century, many employers required employees to waive, as a condition of employment, their right to join together in concerted action. *See generally* Joel I. Seidman, *The Yellow Dog Contract* (1932); Matthew W. Finkin, *The Meaning and Contemporary Vitality of the Norris-LaGuardia Act*, 93 Neb. L. Rev. 6 (2014). These agreements, called "yellow dog" contracts, typically prohibited employees from joining a union and often went further, "proscrib[ing] *all* manner of concerted activities." Finkin, *supra*, at 16 (emphasis added). Although individual employees lacked any real power to refuse to sign these agreements, courts nonetheless issued injunctions enforcing them. *See, e.g.*, *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917). Employers thus grew more and

more brazen in playing "[a]n almost endless array of legal games . . . that made almost all collective action by workers susceptible to legal prohibitions." Finkin, *supra*, at 14-15 (quoting Daniel Jacoby, *Laboring for Freedom: A New Look at the History of Labor in America* 62 (1998)).

Although many states attempted to solve this problem by prohibiting employers from using certain types of yellow dog contracts, *see* Felix Frankfurter & Nathan Greene, *Legislation Affecting Labor Injunctions*, 38 Yale L.J. 879, 889 (1929), these statutes were usually invalidated under then-prevalent notions about liberty of contract. *See, e.g.*, *Coppage v. Kansas*, 236 U.S. 1 (1915) (overturning a state statute that had prohibited employers from requiring employees not to join a union); *Adair v. United States*, 208 U.S. 161 (1908) (overturning provisions in a similar federal law).

Several states then enacted statutes, modeled after a provision in the Clayton Act, limiting the jurisdiction of state courts to issue injunctions in labor cases. *See* Frankfurter & Greene, *supra*, at 918-19 (citing laws in Arizona, Illinois, Kansas, Minnesota, New Jersey North Dakota, Oregon, Utah, Washington, and Wisconsin). But again these laws were invalidated, or narrowly construed, by the courts. *Id.* at 917-20; *see also Traux v. Corrigan*, 257 U.S. 312 (1921) (finding Arizona's law unconstitutional).

Starting in 1929, therefore, some states began to try a new approach. These states passed statutes declaring void and unenforceable all contracts that required an employee to agree "not to join, become, or remain, a member of any labor organization" and all contracts that allowed employers to terminate an employee "in the event that he joins, becomes, or remains a member of any labor organization." 1929 Wis. Sess. Laws ch. 123; 1931 Ariz. Sess. Laws ch. 19; 1931 Colo. Sess. Laws ch. 112; 1931 Ohio Laws at 562; 1931 Or. Laws ch. 246.

In 1932, Congress went even further and passed the Norris-LaGuardia Act to end permanently the era of the yellow dog contract. As Congress expressly declared, "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and . . . thereby to obtain acceptable terms and conditions of employment." 29 U.S.C. § 102. To solve this problem, Congress did three things in the act.

First, Congress curtailed the jurisdiction of the federal courts to issue injunctions in labor cases. Second, Congress declared, as the public policy of the United States, that workers must "be free from the interference, restraint, or coercion of employers" in "self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 102. Third, and most importantly for purposes of this case, Congress mandated that any contract "in conflict with th[is] public policy . . . shall not be enforceable in any court of the United States," 29 U.S.C. § 103, and that "[a]ll acts and parts

of acts in conflict with the provisions of this chapter are repealed," 29 U.S.C. § 115.

By these terms, the 1932 Norris-LaGuardia Act went further than any state law on the books at the time. The new federal law rendered unenforceable not only contract terms that required employees to waive their right to form a union, but also all other terms that "interfere[d]" with employees' ability to engage in "concerted activities for . . . mutual aid or protection." 29 U.S.C. §§ 102, 103. This broader language was no accident; "the draftsmen sought to give the policy announced in [the statute] the broadest possible sweep" to combat the "endless array of legal games" being played by employers. Finkin, *supra*, at 15 (internal quotation marks omitted). As one of the law's sponsors explained, Congress intended the Norris-LaGuardia Act to end the regime under which "the laboring man must accept unconditionally the terms laid down by the employer" and must agree as a condition of employment to "singly present any grievance." 75 Cong. Rec. 4504 (1932) (remarks of Sen. Norris).

In recognition of these same principles, many states soon enacted so-called "little Norris-LaGuardia acts." Eileen Silverstein, *Collective Action, Property Rights and Law Reform: The Story of the Labor Injunction*, 11 Hofstra Lab. L.J. 97, 108 (1993). Maryland's law, for example, affirms that an "individual worker" is often "helpless to exercise liberty of contract," and declares that workers must be "free from coercion, interference, or restraint by an employer" when engaging in

"concerted activity for the purpose of collective bargaining or other mutual aid or protection." Md. Code Ann., Lab. & Empl. § 4-302. Other states' little Norris-LaGuardia Acts typically include similar declarations of public policy.[1]

Unlike the state laws that preceded the Norris-LaGuardia Act, many of these subsequent state statutes also render unenforceable in state court *any* contract that conflicts with the statute's stated public policy, not just those that prohibit employees from joining a union.[2] These statutes, like the federal act, thus render unenforceable all contract terms requiring individual employees to waive their right to engage in concerted activities for their mutual aid or protection.

2. Three years later, Congress took another step to protect workers. In 1935, Congress enacted the NLRA – also known as the Wagner Act – to reduce industrial strife, to ensure that employees could exercise "actual liberty of contract," and to "restor[e] equality of bargaining power between employers and employees." 29 U.S.C. § 151. The statute granted individual employees express rights to form and join labor unions

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[1] *See, e.g.*, Cal. Labor Code § 923; 22 Guam Code Ann. § 5302; Haw. Rev. Stat. § 380-2; Idaho Code § 44-701; 820 Ill. Comp. Stat. 5/1.2; Ind. Code § 22-6-1-2; La. Rev. Stat. Ann. § 23:822; Minn. Stat. § 185.08; N.D. Cent. Code § 34-08-02; Or. Rev. Stat. § 662.020; Pa. Stat. Ann. tit. 43, § 206b; Utah Code Ann. § 34-19-1; Wash. Rev. Code § 49.32.020; Wis. Stat. § 103.51; Wyo. Stat. Ann. § 27-7-101.

[2] *E.g.*, 22 Guam Code Ann. § 5303; Haw. Rev. Stat. § 380-3; Ind. Code § 22-6-1-3; Minn. Stat. § 185.09; Or. Rev. Stat. § 662.030; Wash. Rev. Code § 49.32.030.

and to engage in "other concerted activities for the purpose of . . . mutual aid and protection." 29 U.S.C. § 157. As is particularly important here, the law also made it illegal for employers to interfere in any way with those rights. 29 U.S.C. § 158. The purpose of these provisions was "to protect the right of workers to act together to better their working conditions." *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962).

Following Congress's lead, after passage of the NLRA, many states enacted "little Wagner Acts" to grant employees not covered by the NLRA the same "right" to engage in "concerted activities" for their "mutual aid or protection."[3] These laws, like the NLRA, are grounded in the reality that most individual workers cannot exercise "actual liberty of contract,"[4] and in the desire to ensure that "[n]egotiation of terms and conditions of work should result from voluntary agreement

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[3] Colo. Rev. Stat. § 8-3-106; Conn. Gen. Stat. § 31-104; Haw. Rev. Stat. § 377.4; Kan. Stat. Ann. § 44-803; Mass. Gen. Laws ch. 150A § 3; Mich. Comp. Laws § 423.8; Minn. Stat. § 179.10; Neb. Rev. Stat. § 48-904; N.Y. Labor Law § 703; Or. Rev. Stat. § 663.110; Pa. Stat. Ann. tit. 43, § 211.5; R.I. Gen. Laws § 28-7-12; S.D. Codified Laws § 60-9A-2; Vt. Stat. Ann. tit. 21, § 1503; Utah Code Ann. § 34-20-7; 24 V.I. Code § 64; W. Va. Code § 21-1A-3; Wis. Stat. § 111.04. Some states that do not have little Wagner Acts nonetheless recognize the right of employees to engage in "concerted activities" in other places in their codes. *E.g.*, Fla. Stat. § 447.03; N.D. Cent. Code § 34-12. The Commonwealth of Puerto Rico has even enshrined this right in its Constitution. P.R. Const., art. II, § 18.

[4] *E.g.*, Mass. Gen. Laws ch. 150A § 1; Pa. Stat. Ann. tit. 43, § 211.2; R.I. Gen. Laws § 28-7-2.

between employer and employee."[5] Little Wagner Acts protect some of the most vulnerable members of our society, including employees of certain small businesses and, in many cases, independent contractors and agricultural laborers. *See* U.S. Government Accountability Office ("GAO"), GAO-02-835, *Collective Bargaining Rights: Information on the Number of Workers With and Without Bargaining Rights*, at 41-42 (Sept. 2002).

Together, the Norris-LaGuardia Act, the NLRA, and their state analogues stand for the same basic proposition: Individual employees need the ability to join together to meaningfully protect their interests, and employers should not be able to force employees to sign away that ability just to earn a living.

II. The Federal Arbitration Act Does Not Override the Rights of Employees to Engage in Concerted Activities.

As the National Labor Relations Board ("NLRB") and the Employees have explained, arbitration clauses that require individual employees to waive all collective claims violate the right to engage in "concerted activities" under § 7 of the NLRA and constitute yellow dog contracts that conflict with § 103 of the Norris-LaGuardia Act. *See* Brief of Pet'r NLRB at 22-35; Brief of Resp. Morris at 30-35; Brief of Resp. Lewis at 26-34;

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[5] *E.g.*, Colo. Rev. Stat. § 8-3-102; Neb. Rev. Stat. § 48-901; Utah Code Ann. § 34-20-1; *see also* Cal. Labor Code § 923 (expressing the same view in a related context); Nev. Rev. Stat. § 614.090 (same).

Brief of Resp. Hobson at 28-34, 54. Such waiver provisions are thus illegal under the NLRA and unenforceable under the Norris-LaGuardia Act. The only remaining question is whether the Arbitration Act supersedes these labor statutes and makes the waivers enforceable. It does not.

By its own terms, the Arbitration Act's saving clause permits enforcement of a generally applicable rule voiding any contract term, whether in an arbitration agreement or otherwise, that is illegal under the NLRA or unenforceable under the Norris-LaGuardia Act. But, even if that were not the case, the Arbitration Act must give way to the later-enacted NLRA and Norris-LaGuardia Act. Congress enacted those two statutes to protect workers from being forced to sign away their rights to join together for mutual aid or protection. Whatever the state of the law before those enactments, therefore, employers may not require individual employees to prospectively waive their rights under those statutes.

1. The Arbitration Act provides that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As this text unmistakably suggests, Congress intended to make "arbitration agreements as enforceable as other contracts, *but not more so*." *Prima Paint Corp.*, 388 U.S. at 404 n.12 (emphasis added). A correct reading of the saving clause thus preserves the longstanding rule from *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), and *J.I. Case Co. v. NLRB*, 321 U.S. 332

(1944), that contract terms mandating "the renunciation by employees of rights guaranteed by" the NLRA are illegal, *National Licorice Co.*, 309 U.S. at 361, and "must yield" to the NLRA, *J.I. Case Co.*, 321 U.S. at 337.

In contrast, the Employers' interpretation of the Arbitration Act would elevate arbitration agreements to a special place of privilege above every other type of contract: Even though the NLRA would void all other contract provisions that required individual employees to waive their rights, the same waiver contained in an arbitration agreement would be protected from scrutiny. This would turn congressional intent on its head. *See* H.R. Rep. No. 96, 68th Cong., 1st Sess., at 1 (1924) (explaining that Arbitration Act would put arbitration agreements "upon the *same footing* as other contracts" (emphasis added)).

Nor does *Concepcion* require the NLRA or Norris-LaGuardia Act to yield to the Arbitration Act. That decision, as the NLRB and the Employees have explained, rested on principles of obstacle preemption, and these principles have no relevance when harmonizing (or choosing between) two co-equal federal statutes. *See* NLRB Br. at 40; Lewis Br. at 40; Hobson Br. at 38-39. But even if *Concepcion* were applicable, the saving clause would still preserve a generally applicable rule rendering void any agreement that violates either the NLRA or the Norris-LaGuardia Act (or one of the state analogues to those statutes).[6]

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[6] For this reason, the Employers are wrong to suggest that, if a state adopted the same facially neutral rule adopted by the

In *Concepcion*, this Court held that the saving clause did not encompass a state common-law rule that, though neutral on its face, was intended to "disfavor[] arbitration," 563 U.S. at 341; had a "disproportionate impact" on arbitration agreements, *id.* at 342; and "interfere[d] with fundamental attributes of arbitration," *id.* at 344. But none of these three factors are present here.

As an initial matter, there is no evidence that the rule from *National Licorice* and *J.I. Case* on which the Sixth, Seventh, and Ninth Circuits relied – namely, invalidating contract terms that require employees to renounce their rights to engage in concerted activities – was intended to disfavor arbitration or to circumvent this Court's much later cases interpreting the Arbitration Act. The rule was instead designed to protect employees' rights to join together for their mutual aid or protection, rights that are meaningless if employers can force individual employees to waive them as a condition of employment.

Similarly, far from having a disproportionate impact on arbitration, this generally applicable rule applies equally to a vast array of contracts other than arbitration agreements. The rule invalidates any contract term that requires an individual employee to waive his or her rights to engage in concerted activities as a condition of employment, regardless of the type of

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Sixth, Seventh, and Ninth Circuits, "that state law would be preempted by the Arbitration Act." Brief for Pet'r Ernst & Young at 16.

contract. Under the rule, therefore, an employer may still require that its employees sign an arbitration agreement so long as the terms of the agreement do not violate the employees' rights to act collectively.

The rule also does not conflict with the "fundamental attributes of arbitration." *Concepcion*, 563 U.S. at 344. *Concepcion* held that a rule requiring employers to permit *class* arbitration in *consumer* cases conflicted with the Arbitration Act. *See id.* But the rule here, as applied by the Sixth, Seventh, and Ninth Circuits, did no such thing; it merely invalidated contract terms that required individual employees to waive *all* rights to *all* types of concerted legal claims, in both court and arbitration. This Court has never suggested that it is a fundamental attribute of arbitration to prohibit every kind of group claim in every kind of arbitration proceeding.

According to *Concepcion*, requiring class arbitration in consumer cases conflicted with the Arbitration Act only because: (1) class procedures make the process too formal, sacrificing the supposed efficiency of arbitration, 563 U.S. at 348-49; (2) the class mechanism "*requires* procedural formality" to ensure that absent class members will be "bound by the results of the arbitration," *id.* at 349 (emphasis in original); and (3) class actions create stakes that are too high for arbitration by aggregating "tens of thousands of potential claimants," *id.* at 350.

These same concerns do not apply to other types of joint legal actions, such as the standard joinder or

consolidation of related claims and collective actions under the Fair Labor Standards Act ("FLSA"). *See* Catherine L. Fisk, *Collective Actions and Joinder of Parties in Arbitration: Implications of* D.R. Horton *and* Concepcion, 35 Berkeley J. Emp. & Lab. L. 175, 192-99 (2014). To the contrary, joint legal action by employees in the form of either joinder or collective action is consistent with arbitration.[7] *See id.*

With respect to joinder, for example, an arbitration involving a small number of employees with related claims will not be any more formal or any less efficient than a bilateral arbitration. A joint case also would not require the same type of special procedural formality as in a class action, given that there are no absent parties whose due process rights must be protected. And there is no risk that the joinder of claims will "change the stakes" of arbitration, *Blue Cross Blue Shield of Mass., Inc. v. BCS Ins. Co.*, 671 F.3d 635, 639-40 (7th Cir. 2011) (Easterbrook, J.) (distinguishing class arbitration from the consolidation of related claims), because joinder will never result in the aggregation of "tens of thousands" of claims into one proceeding, *Concepcion*, 563 U.S. at 350.

Similarly, with respect to collective actions under the FLSA, this Court has recognized that collective

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[7] Because the arbitration agreements at issue here prohibit all types of concerted legal action, there is no need to decide whether requiring the availability of an *employment* class action (as opposed to a consumer class action) would be inconsistent with the fundamental attributes of arbitration or whether an arbitration clause that requires employees to waive class actions – but not other joint legal actions – would be enforceable.

actions are "fundamentally different" from class actions, *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1529 (2013), especially compared to the consumer class actions at issue in *Concepcion*. Unlike with class actions, an employee must affirmatively opt into an FLSA collective action. 29 U.S.C. § 216. Thus, no special procedural formality would be required to protect the due process rights of absent employees; the "only plaintiffs who will be bound" in a collective arbitration under the FLSA are those who "receive notice of the action and choose to join it." Fisk, *supra*, at 196.

Collective actions also tend to be much smaller than class actions, and are unlikely to involve tens of thousands of claimants. *See In re D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2287 (2012). This is because plaintiffs have to opt into a collective action, which only about 16% of potential plaintiffs do, and because the universe of potential plaintiffs is smaller in the employment context, where the average employer has only 20 employees. *See* Iliza Bershad, Note, *Employing Arbitration: FLSA Collective Actions Post*-Concepcion, 34 Cardozo L. Rev. 359, 385-87 (2012). The collective arbitration of these types of claims, like the joinder of such claims, is thus "far less cumbersome and more akin to an individual arbitration" than class arbitration, especially consumer class arbitration. *D.R. Horton*, 357 N.L.R.B. at 2287.

In light of this reality, there is no reason for requiring employees to waive these types of joint actions other than that most workers are powerless to refuse and – as explained more in Part III below – many

workers will not bring claims at all if they cannot join together with their fellow employees. Thus, contrary to the Employers' protestations, the Arbitration Act does not compel the federal courts to enforce these waivers.

2. Even if the Employers' interpretation of the saving clause were correct, the Arbitration Act does not override an employee's substantive rights under the NLRA or the express requirements of the Norris-LaGuardia Act.

The NLRA and the Norris-LaGuardia Act, not the Arbitration Act, govern whether employers may dictate the terms under which their individual employees can join together for "mutual aid or protection." 29 U.S.C. §§ 102, 157. Congress designed these two labor statutes to protect employees from being forced to sign away their right to act collectively. *See supra* at 10-14. Allowing employers to dictate the terms under which their employees may act collectively would thus run counter to everything that Congress sought to accomplish.

Put another way, Congress did not intend to authorize employers to exploit their bargaining power to force employees to waive the very rights that were intended to protect them from that unequal bargaining power in the first place. Indeed, Congress made that clear in specifying that the Norris-LaGuardia Act repealed all "acts and parts of acts" that "conflict with" its provisions. 29 U.S.C. § 115. That includes any conflicting provision in the previously enacted Arbitration Act.

Although unionized employees may waive some concerted activities as part of a collective bargaining agreement, the Employers are wrong to suggest that this ability to bargain away rights *collectively* means that employees may be compelled to waive those rights *individually* as a condition of their employment. *See* NLRB Br. at 29-30. When unionized employees negotiate with their employers, the union and employer bargain on roughly equal terms, and thus the employees will receive something of value in return for agreeing to arbitrate all of their claims bilaterally. But, as Congress expressly recognized in enacting the NLRA and Norris-LaGuardia Act, the same is not true for most individual employees. *See* 29 U.S.C. §§ 102, 151. Allowing employers to effect waivers of the right to concerted activity through individual employment contracts, which most employees lack any meaningful ability to refuse to sign, would thwart the purposes of the NLRA and Norris-LaGuardia Act.

There was a time, of course, when federal courts relied on outdated notions of freedom of contract to override laws protecting employees from being forced to sign away their right to engage in concerted activities. *See, e.g.*, *Coppage*, 236 U.S. at 9-25; *Adair*, 208 U.S. at 173-76. Those decisions, like the Employers' arguments here, rested on the misguided belief that an individual employee is just as free to "sell his labor upon such terms as he deems proper" as an employer is "to prescribe the conditions upon which he will accept such labor." *Adair*, 208 U.S. at 175; *see* Brief for Murphy Oil USA in Support of Cert. at 26-27 ("[T]he

Agreements memorialize a beneficial quid pro quo for both Murphy USA and its employees: employees agree to arbitrate any employment-related claims on an individual basis in exchange for the benefit of new employment.").

In enacting the NLRA and the Norris-LaGuardia Act, however, Congress recognized that individual employees generally do *not* have "actual liberty of contract" when negotiating with their employers. 29 U.S.C. §§ 102, 151. This Court should thus follow Congress's lead and leave the Employers' antiquated conceptions of liberty of contract in the past, where they belong.

III. Allowing Employers to Prevent Employees from Pursuing Collective Claims Would Hamper Enforcement of State and Federal Workplace Protections, Impose Additional Burdens on Government Regulators, and Cause Systemic Under-Enforcement of State and Federal Laws.

Employees who have suffered violations of workplace protections are less likely to bring private enforcement actions when they cannot combine their legal claims. Because government regulators depend on employees to help enforce these state and federal statutes, a ruling negating the ability of employees to arbitrate collectively would put increased pressure on already overtaxed federal, state, and local agencies. Accordingly, a reduction in private enforcement will lead

to the systemic under-enforcement of state and federal laws designed to protect American workers.

1. There is currently an epidemic of wage theft sweeping across the nation, with especially devastating effects on our country's low-wage workers. According to a leading survey of low-wage workers, 26% reported being paid less than the minimum wage and 76% reported being underpaid or not paid at all for overtime. Ruan, *supra*, at 1110 (citing Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* 2, 20 (2009)). As a result of these violations, employers may be stealing up to $50 billion every year from low-wage workers. *See* Brady Meixell & Ross Eisenbrey, *An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year*, Economic Policy Institute (Sept. 11, 2014), http://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds/.

To combat this epidemic, workers must have the ability to join together. Experience shows that individual workers, especially low-wage workers, typically do not challenge wage theft on their own, for at least four reasons.

First, individual employees are often reluctant to file claims because they fear reprisal. Although federal law forbids retaliation, employees know full well that many employers fire, suspend, or demote employees

who file complaints. Ruan, *supra*, at 1120 (noting that 43% of workers reported suffering from these types of reprisals); *see also* David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 Comp. Lab. L. & Policy J. 59, 83 (2005). According to California's Labor Commissioner, "fear is the number one reason why workers do not complain about wage theft." Myron Levin, *Fear Stifles Wage Abuse Complaints*, Tucson Sentinel (May 19, 2014), http://www.tucsonsentinel.com/nationworld/report/051914_wage_abuse/fear-stifles-wage-abuse-complaints/. Low-wage workers are "particularly vulnerable to retaliation because many live 'paycheck to paycheck' in mostly low-skilled jobs, where employers consider them replaceable and therefore expendable." *Id.* Therefore, a low-wage worker may reasonably conclude that his individual claim is not large enough to justify the potential risk of reprisal. Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. Pa. L. Rev. 457, 497 (1992).

Second, employees may not even "know that their rights are being violated" unless and until another colleague files suit. *Id.* at 496. That is why the notice and opt-in procedures of the FLSA are so important; they provide an easy way for an employee to inform his coworkers that their employer has violated their legal rights and to invite others to join in a suit. *See* Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 Brook. L. Rev.

1309, 1348 (2015) (explaining how collective actions under the FLSA serve an important notice function).

Third, an individual's claim for damages is likely to be small. *See* Summers, *supra*, at 497. Most employees, particularly low-wage workers, simply cannot "afford the time and expense it would take to prosecute [these low-value] claims individually." Ruan, *supra*, at 1119. And even if an individual employee wants to file an arbitration claim, the limited size of the potential recovery will make it difficult to find a lawyer. *See* Sternlight, *supra*, at 1334-40.[8]

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[8] Many attorneys are also unwilling to take individual arbitration cases because a plaintiff's chances of winning in arbitration are lower than in court, and damage awards are lower, too. *See* Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, Economic Policy Institute (Dec. 2015), http://www.epi.org/publication/the-arbitration-epidemic/. Based on outdated statistics, the Chamber of Commerce argues that claimants fare just as well in arbitration as in litigation. *See* Amicus Br. of Chamber of Commerce at 34. But more recent studies show that employees are in fact less likely to recover in arbitration than in court *and* that average recoveries in arbitration are lower than in court. *E.g.*, Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 Berkeley J. Emp. & Lab. L. 71, 79-80 (2014) (summarizing information from multiple studies); *see also* Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N. Carolina L. Rev. ___ (forthcoming 2018). For instance, one study found that employees recovered compensation in only 21.4% of arbitrations as compared to 57% of state court employment cases and that the median award was over $30,000 less in arbitrations than in state court cases. Colvin, *supra*, at 79-80.

Fourth, many claims are difficult for an individual worker to substantiate without the help of other claimants because they depend on proving "corporate policies, patterns, and practices." Ruan, *supra*, at 1123. For instance, proving that an employer impermissibly failed to pay workers for off-the-clock work typically requires employees to show "a pattern or practice of employer acquiescence" in the uncompensated work. *Pforr v. Food Lion, Inc.*, 851 F.2d 106, 109 (4th Cir. 1988). Given that it "can be difficult" for a single plaintiff "to identify and prove" these types of "systemic violations," an individual worker will often decide not to bring a claim at all. Ruan, *supra*, at 1123.

These hurdles apply to more than just wage theft cases. Individual workers are also less likely to bring claims for violations of other workplace protections. For example, a worker faces the same types of hurdles in bringing a discrimination claim against his or her employer, particularly the fear of reprisal. *See* Sternlight, *supra*, at 1333-52; Summers, *supra*, at 480-90; *see also* W. Lyle Stamps, *Getting Title VII Back on Track: Leaving* Allison *Behind for the* Robinson *Line*, 17 BYU J. Pub. L. 411, 445 (2003).

2. Too often, therefore, an employee's only real alternative to collective arbitration is not bilateral arbitration; it is no arbitration. Indeed, according to one expert, "almost no . . . employees 'do' arbitration at all," in no small part because of "the bans on collective actions" written into many arbitration agreements. Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the*

Erasure of Rights, 124 Yale L.J. 2804, 2814-15 (2015); *see also* Sternlight, *supra*, at 1330-31 (finding that only one out of every 12,000 employees covered by a mandatory arbitration clause files an arbitration claim in a given year).

That problem has only worsened for workers since *Concepcion* and *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2014), which further emboldened employers to insist on concerted-action waivers. For example, a survey by a consulting firm that represents employers found that the percentage of companies using class action waivers in their arbitration agreements skyrocketed from 16% in 2012 to almost 43% in 2014. *See* The 2015 Carlton Fields Jorden Burt Class Action Survey: *Best Practices in Reducing Cost and Managing Risk in Class Action Litigation*, at 26, http://classactionsurvey.com/2015-survey/. Around the same time, from January to December 2013, there was also a "plunge" of 65% in the number of employees who filed arbitration claims. David Horton & Andrea Cann Chandrasekher, *Employment Arbitration After the Revolution*, 65 DePaul L. Rev. 457, 469 (2016).

These trends are no coincidence. Employers "well know . . . that few individual employees will bring claims." Sternlight, *supra*, at 1345. That is why so many employers include these clauses in the first place – to insulate themselves from liability. *Id.*; *see also* Theodore Eisenberg, et al., *Arbitration's Summer Soldiers*, 41 U. Mich. J. L. Reform 871, 894-95 (2008) (concluding based on empirical evidence that corporations in at

least some industries use arbitration agreements to "avoid[] aggregate dispute resolution" with consumers but, when dealing with their peers, actually prefer litigation to arbitration). Whatever the merits of such choices in other contexts, Congress has prohibited employers from using these types of tactics in the employment context. *See supra* at 10-14.

Although the Chamber of Commerce asserts that bilateral arbitration is "beneficial" to employees because it is less expensive than filing a claim in court, Chamber Br. at 32-33, there is "little evidence" that requiring bilateral arbitration actually "opens doors to dispute resolution that [are] otherwise closed," Resnik, *supra*, at 2901. In reality, the small number of arbitration claims demonstrates that concerted action waivers "erase rather than to enhance the capacity to pursue rights." *Id.* at 2893.

3. The void created by this reduction in private enforcement likely cannot be filled by state and federal regulators. Most state and federal employment laws were designed to be enforced primarily by employees, rather than government agencies. With respect to the FLSA, for example, Congress purposefully "established a regulatory scheme that was largely dependent on enforcement by private litigation." J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 Wm. & Mary L. Rev. 1137, 1150 (2012). Indeed, "[o]ver time, Congress increased incentives for private suits under the FLSA, while simultaneously limiting funding for" government enforcement. *Id.*

The same is true for anti-discrimination statutes. The EEOC "was not designed to challenge every instance of discrimination in U.S. employment." Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 Akron L. Rev. 813, 844 (2004); *see also* 2007 Md. Laws ch. 177 (amending Maryland's anti-discrimination law, which initially relied solely on government enforcement, to provide for a private right of action). Instead, the bargain that Congress struck in enacting Title VII of the Civil Rights Act of 1964 was to rely heavily on private suits by employees in lieu of more "vigorous enforcement" by the EEOC. Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 Vand. L. Rev. 363, 383-84 (2010) (summarizing the compromises made during the legislative debates on Title VII).

Although state and federal regulators play an important role, these already overburdened regulators do not have the resources to make up for a reduction in private enforcement. For example, the United States Department of Labor (the "Department"), which is charged with enforcing federal wage-and-hour laws, receives more than 20,000 complaints per year,[9] and has long struggled to respond to all of them. *See* GAO, GAO-09-458T, *Wage and Hour Division's Complaint Intake and Investigate Processes Leave Low Wage Workers Vulnerable to Wage Theft* (Mar. 25, 2009), http://www.gao.gov/assets/130/122107.pdf. Even as the

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[9] Department of Labor, Wage and Hour Division Data Tables, https://www.dol.gov/whd/data/datatables.htm.

number of workplaces subject to the Department's jurisdiction has grown, funding from Congress has not kept pace. *See* Annette Bernhardt & Siobhan Mcgrath, *Trends in Wage and Hour Enforcement by the U.S. Department of Labor 1975-2004*, Brennan Center for Justice, at 2 (Sept. 1, 2005). As a result, the number of enforcement actions filed by the Department under the FLSA fell by 36% from 1975 to 2004. *Id.*

State regulators suffer from similar resource challenges. According to a 2011 study, many of the state agencies responsible for enforcing wage-and-hour laws receive thousands of complaints per year. *See* Jacob S. Meyer & Robert Greenleaf, *Enforcement of State Wage and Hour Laws: A Survey of State Regulators* 98-106 (April 2011). But a majority of these agencies had fewer than 25 employees devoted to wage-and-hour enforcement, and many agencies had fewer than ten employees. *Id.* at 73-80.

Most states also continue to struggle with chronic budget shortfalls[10] and many of those states have been

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[10] *See, e.g.*, Ryan Maness, *Thirty-One States Face Revenue Shortfalls for the 2017 Fiscal Year*, MultiState Insider (Jan. 3, 2017), https://www.multistate.us/blog/thirty-one-states-face-revenue-shortfalls-for-the-2017-fiscal-year; National Ass'n of State Budget Officers, *Summary: Spring 2017 Fiscal Survey of States*, 1 (June 15, 2017), http://www.nasbo.org/mainsite/reports-data/fiscal-survey-of-states (explaining that "[g]eneral fund revenues . . . are coming in below original budget forecasts in 33 states" in 2017 and that "[f]iscal 2016 and fiscal 2017 were marked by lackluster general fund revenue growth, resulting in numerous revenue shortfalls and requiring many states to make mid-year budget cuts in one or both years").

forced to cut funds and to institute prolonged hiring freezes. Irene Lurie, *Enforcement of State Minimum and Overtime Laws: Resources, Procedures, and Outcomes*, 15 Employee Rts. & Emp. Pol'y J. 411, 421 (2011); Meyer & Greenleaf, *supra*, at 22; *see also* Spencer Woodman, *The Wage Theft Epidemic*, In These Times (Feb. 20, 2013), http://inthesetimes.com/article/14595/wage_theft_epidemic (recounting the effects of past budget cuts in Hawaii, Iowa, Michigan, Missouri, New Jersey, North Carolina, Ohio, Oregon, South Carolina, Virginia, and Wisconsin).

A lack of staff has thus been "a perennial constraint" for state regulators in enforcing their wage-and-hour laws. Lurie, *supra*, at 421. Because of these limited resources, state agencies, despite their best efforts, are usually "just scratching the surface" of potential violations and must rely solely on complaints from employees to uncover problems. *Id.* (quoting one state administrator). Some states do not even have an agency that "engages in *any* meaningful enforcement of wage and hour standards," Meyer & Greenleaf, *supra*, at 16 (emphasis added), and must rely solely on enforcement by the federal government or by private employees.

Recently, the growing wage theft epidemic has put even more pressure on already under-resourced state agencies. For instance, "an exploding caseload" in 2015 "overwhelmed [the] small staff" at North Dakota's Department of Labor. Mike Nowatzki, *Spike in Complaints Leads to Investigation Backlog at N.D. Labor Department*, Bismark Tribune (Oct. 23, 2015); *see also*

Woodman, *supra* (quoting former state investigators who were forced to try to personally handle anywhere from 250 to 1000 claims every year). The states thus lack the resources to solve this problem on our own. We need help from employees.

The same is true for the enforcement of state and federal anti-discrimination laws. At the federal level, the EEOC suffers from severe resource constraints and an ever-shrinking budget, meaning that it receives far more complaints than it can handle on an annual basis. *See* Pauline T. Kim, *Addressing Systemic Discrimination: Public Enforcement and the Role of the EEOC*, 95 B.U. L. Rev. 1133, 1143 (2015). The agency has "never successfully cleared" this "persistent backlog." *Id.* at 1144.

Like the EEOC, state and local agencies also often "lack the requisite funding to efficiently enforce" state and local anti-discrimination laws. Timothy A. Galáz, *Bargaining for the Next Gay Player: How Can Jason Collins Help to Develop the National Basketball Association into a More Inclusive Workplace?*, 21 Jeffrey S. Moorad Sports L.J. 461, 499 (2014); *see also* Katherine Tonnas, *The Louisiana Commission on Human Rights: Committed to Protecting Citizens from Discriminatory Practices*, 51 La. B.J. 266, 266 (2003) (quoting the former Chair of the Louisiana Commission on Human Rights, expressing disappointment that the Commission had not been able to do its job because it had not been adequately funded).

4. A ruling in favor of the Employers here, therefore, would lead to the systemic under-enforcement of state and federal employment laws. In addition to hurting employees, this systemic under-enforcement would also "disadvantage [those] responsible employers who are forced to compete with unscrupulous competitors." Ruan, *supra*, at 1111. Indeed, unscrupulous employers stand to benefit more than anyone because joint legal action plays an even more important role in combating widespread, systemic violations of the law than it does in deterring isolated incidents. Some law-abiding employers might even feel pressure to start breaking the law themselves. After all, when the costs of complying with the law are greater than costs of breaking the law, employers have an inherent incentive to cheat.

In sum, this Court should not sanction employers' efforts to "free themselves to violate wage and hour laws, to discriminate, to impose unsafe working conditions, and to otherwise violate federal and state labor and employment laws with impunity." Sternlight, *supra*, at 1313-14. That is not what Congress wanted. Congress sought to encourage robust enforcement of employment laws, not encourage employers to foster creative pathways to evade compliance.

CONCLUSION

The judgments of the courts of appeals in Nos. 16-285 and 16-300 should be affirmed, and the judgment in No. 16-307 should be reversed.

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